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No. 08-134

Supreme Court, U.S.
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In The

Supreme Court of the United States

NOEL CORNELIO, et al.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and PHOENIX PROCESSOR LIMITED PARTNERSHIP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. Did the National Labor Relations Board correctly apply this Court's holding in *Southern Steamship v. NLRB*, 316 U.S. 31 (1942), when it found that Section 7 of the National Labor Relations Act did not confer upon striking seamen the right to refuse the Captain's order to return to work when the seamen were in the service of the vessel and away from its home port?

2. Did the Ninth Circuit Court of Appeals properly deny review of the NLRB's decision denying reinstatement of petitioner-seamen?

3. Would it violate the Constitutional requirement of separation of powers if this Court altered the definition of "seaman" to exempt petitioners from the statutory requirement that seamen may not willfully disobey the orders of the ship's Captain?

PARTIES TO THE PROCEEDING

Petitioners:

Asuncion Aguirre
Winston Brown
Jose Cabrera
Joel Comacho
Jorge Comacho
Jose Cervantes
Noel Cornelio
Ricardo Cuevas
Jose Delgadillo
Alfonso Flores
Gabriel Garibay
Baltazar Gonzalez
Juan Lovos
Miguel Martinez
Brad Monaco
Cesar Nieto
Maurisio Ramirez
Juan Reyes
Ruben Ruiz
Luis Verduzco, Jr.
Luis Verduzco, Sr.

Respondents:

National Labor Relations Board

Phoenix Processor Limited Partnership

CORPORATE DISCLOSURE STATEMENT

Phoenix Processor Limited Partnership, Inc., states that no parent corporation or any publicly traded corporation owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 184 L.R.R.M. (BNA) 2476, 2008 WL 1924931 (May 1, 2008), and has been submitted to the Court as Appendix A to the Petition for a Writ of Certiorari.

The decision of the National Labor Relations Board is reported at 348 NLRB No. 4, 2006 WL 2559841 (August 31, 2006), and has been submitted to the Court as Appendix B to the Petition for a Writ of Certiorari.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved in this matter is:

> **Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

Article I, Sec. 1.

Statutory provisions involved in this matter are:

Penalties for specified offenses. When a seaman lawfully engaged commits any of the following offenses, the seaman shall be punished as specified:

. . .

(4) For willful disobedience to a lawful command at sea, the seaman, at the discretion of the master, may be confined until the disobedience ends, and on arrival in port forfeits from the seaman's wages not more than 4 days' pay or, at the discretion of the court, may be imprisoned for not more than one month.

(5) For continued willful disobedience to lawful command or continued willful neglect of duty at sea, the seaman, at the discretion of the master, may be confined, on water and 1,000 calories, with full rations every 5th day, until the disobedience ends, and on arrival in port forfeits, for each 24 hours' continuance of the disobedience or neglect, not more than 12 days' pay or, at the discretion of the court, may be imprisoned for not more than 3 months.

46 U.S.C. § 11501(4-5).

Incitation of seamen to revolt or mutiny. Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and

maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect his proper duty on board thereof, or to betray his proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2192

Revolt or mutiny of seamen. Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny, and shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2193

> **Right of employees as to organization, collective bargaining, etc.** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157

> **Unfair labor practices**. It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . .

29 U.S.C. § 158(a)(1).

STATEMENT OF THE CASE

On February 2, 2003, following several hours of inactivity in the factory of the S/S OCEAN PHOENIX – a 635 foot United States Coast Guard inspected fish processing vessel in operation outside state territorial

waters in the Bering Sea – 21 seamen dissatisfied with their work hours walked off the job, taking another six unsuspecting crewmembers with them. Petitioners' App. (hereafter, "P. App.") B-2-4; 42-3. The timing of the walkout was not accidental, as the crew had been informed when fish had been taken aboard. P. App. B-37-38. The fish must be aged before processing, and the crew had subsequently been told that the start of processing operations was imminent. *Id.*

Some of the seamen may have been misled by their colleagues that vessel management had called a meeting to address their complaints about their work hours. But the Captain informed them that their complaints would be addressed at the next break in factory operations, and told them to return to their posts. *Id.,* B-4-5. The petitioners willfully refused orders to return to work from both the Captain and the factory manager. *Id.,* B-12. With such a large group of "obviously unhappy" crewmembers refusing to follow orders, the Captain was concerned a "serious situation" would develop. *Id.,* B-5. He was forced to take an unscheduled detour to Dutch Harbor, Alaska, to discharge this significant segment of the crew who refused to follow the chain of command. P. App. B-5.

The striking petitioners represented 21 of approximately 120 fish processors employed aboard the vessel. Petitioners' and all other OCEAN PHOENIX crewmembers' compensation was based upon production, pursuant to individual crew contracts required by federal statute (46 U.S.C. § 10601). P. App. B-11. There was no collective bargaining agreement, and

no union election was anticipated. The employer, respondent Phoenix Processor Limited Partnership ("Phoenix"), had no legal obligation to meet with these seamen or negotiate any terms or conditions of employment. Phoenix did reasonably expect the seamen petitioners to comply with the Captain's orders including an order to return to their posts. When these seamen refused to comply with the Captain's order to return to their posts, the Captain fairly concluded petitioners had breached their contracts and abandoned their employment.

After returning home, the seamen initiated proceedings with the National Labor Relations Board. Over Phoenix's objections to the Board's jurisdiction, charges were lodged alleging violation of Sections 7 and 8 of the National Labor Relations Act ("NLRA;" codified as 29 U.S.C. §§ 157 and 158).

Following trial on the charges (P. App. B-30), the Administrative Law Judge found, *sua sponte,* that the seamen were not, as a matter of law, "seamen" subject to the statutory requirement of obedience to the orders of the ship's master. P. App. B-62. Phoenix filed exceptions to the ALJ's findings and decision. P. App. B-1. On August 31, 2006, the National Labor Relations Board (the "Board" or "NLRB") reversed the ALJ's decision, finding that the workers were seamen and, based on this Court's decision in *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942), ruled that these seamen were not protected by the NLRA when they engaged in a work stoppage and strike

aboard the S/S OCEAN PHOENIX. P. App. B-1-2. Petitioners sought review in the Ninth Circuit Court of Appeals, which had jurisdiction to consider the workers' petition for review of the Board's decision pursuant to 29 U.S.C. § 160(f). The Ninth Circuit denied the petition for review, opining that the court was bound by this Court's reasoning and holding in *Southern Steamship, supra*. P. App. A-2.

COUNTERSTATEMENT OF FACTS

Petitioners contend that they were "factory workers employed in a factory that happens to be located on a floating vessel. . . ." Petition, p. 3. This contention – and the corollary assertion that petitioners were not "seamen" – was advanced by the Administrative Law Judge (P. App. B-62), rejected by the Board (P. App. B-8), and was not argued at all on review to the Ninth Circuit Court of Appeals. This is because, applying this Court's test set forth in *Chandris v. Latsis,* 515 U.S. 347 (1995), it is clear that petitioners were seamen as a matter of law.

Petitioners' claim that the fact that they work in the ship's factory somehow diminishes their obligations as seamen is mistaken in several respects.

First, Petitioners were employed on a ship on the high seas, not in a land-based factory. P. App. B-2, 31. Each of the seaman petitioners worked, ate, slept, and engaged in leisure activities confined to a vessel in the Bering Sea for weeks at a time without seeing port, in

the company of about 220 other crewmembers. At the end of their shifts, they could not leave the vessel. If they engaged in misconduct, the Captain could not order them to leave the premises. If the ship was compromised or took on water, or if there was a fire on board the ship, the Captain had to rely on the entire crew to respond to his orders to fight the fire or to abandon ship to avoid the loss of life, cargo and property. These are conditions not experienced by "factory workers employed in a factory" on land.

Second, petitioners' employment contracts expressly require obedience to the ship's officers. P. App. B-11-12. Each contract states:

> 1. DUTIES. Employee shall perform his/her duties as requested by the owner, whether written or oral, in connection with the ship's operating and processing activities. Employee will perform such duties at the direction of the employer, Master, Manager, Supervisor or other person designated by the owner of Master. . . . Failure to perform any of the duties as assigned may result in disciplinary action up to and including termination.

Respondent's App. A-1 (hereafter, "R. App.").

The employee "Informational Booklet" further emphasizes the maritime nature of the workplace, and some of the special duties required of petitioners in this unique workplace:

> You will be shown the location of safety and survival equipment *and a "Station Bill" that assigns each employee a job* and place to go in the event of an emergency. . . .
>
> Starting before you join the vessel and continuing afterwards, you will attend many orientation meetings. The focus of most of these meetings is your safety, the safety of those around you and the safety of the vessel itself. . . .

Informational Booklet, p. 9 (R. App. B-2; italics added). A crewmember is also informed that he or she is subject to discharge for, "[i]nability, negligence or unwillingness to perform assigned work." *Id.* p. 13 (R. App. B-4). This encompasses both processing fish duties and the requirement of responding to emergencies.

REASONS TO DENY THE PETITION

I. There Are No Compelling Reasons To Alter The Holding Of *Southern Steamship*.

This Court has held that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). As Mr. Justice Black once stated in dissent:

> Having given our view on the meaning of a statute, our task is concluded, absent extraordinary circumstances. When the Court

> changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature.

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 258 (1970). Petitioners have identified no "extraordinary circumstances" to support a change in the Court's holding.

Here, this Court previously interpreted two statutes enacted by Congress and spoke on the question of whether certain maritime laws take precedence over potentially conflicting labor laws. It held that seamen must follow the orders of the ship's Captain, including an order to return to work. *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 38 (1942).

In *Southern Steamship*, this Court held that a seaman's duty of obedience was absolute when he or she was in the service of the vessel and away from home port. Congress has had 56 years to alter this holding, but it has not done so. As will be discussed below, petitioners have identified no compelling reason why this Court should reconsider its holding. Indeed, "*[s]tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406 (1932) (dissent). This matter was settled, and it was settled right.

A. The Reasoning Of The Court In *Southern Steamship* Retains Its Currency.

Petitioners argue that the reasoning applied by the Court in *Southern Steamship* is outdated and should not apply to them. In effect, they ask the Court to abandon the logic and reasoning of its decision and find that they are exempt from the long-standing rule that a seaman must follow the orders of the Captain. Beyond identifying changes in the use of certain vessels (riverboats as casinos, or barges into floating factories), petitioners have failed to identify any change that would alter the fundamental nature of employment on a ship at sea that could lead this Court to decide *Southern Steamship* differently today than in 1942.

1. The Facts Of *Southern Steamship*.

In *Southern Steamship*, after the NLRB ordered an election to determine the collective bargaining agent for *Southern Steamship*'s unlicensed employees, the company refused to recognize the National Maritime Union or to bargain with the Union. *Id.*, 316 U.S. at 32-33. While the S/S CITY OF FORT WORTH (home ported in Philadelphia, Pennsylvania) was docked in Houston, Texas, a number of the crew struck to force recognition of the Union. *Id.*, at 33. The seamen engaged in no violence, nor did they interfere with the work of non-striking crew or the officers. *Id.* After various unsuccessful efforts to persuade the striking seamen back to work (including

orders from the Captain and other officers, and a visit from a deputy U.S. Shipping Commissioner who read the seamen a provision of their shipping articles requiring they "be obedient to the lawful commands" of the Master), the company's attorney (without authorization from the company) promised the Union's attorney that he would recommend to the company that the Union be granted access to the vessel. *Id.*, at 34-35. The striking seamen thereupon returned to work, but when the ship returned to its home port, some of the striking workers were fired. *Id.*

2. The Court's Analysis In *Southern Steamship*.

This Court had no difficulty finding that the company had engaged in unfair labor practices, and that those unfair practices had given rise to the strike. *Id.*, at 37-38. This Court nonetheless found that it was an abuse of the discretion for the NLRB to order reinstatement of the seamen because the strike – a refusal to obey the Captain's orders to return to work – "was conducted by seamen on board a vessel and away from home port." *Id.*, at 38.

That the mutiny was accomplished without violence, threats or immediate risk to the safety of the ship was irrelevant in this Court's view. This Court rejected the argument that seamen may have the right to strike in disobedience of the Captain's orders "when as here their vessel is moored to the

dock in a safe domestic port." *Id.*, at 43. In analyzing the purpose and intent of Congress with respect to a seaman's duty of obedience as reflected by the mutiny statutes (18 U.S.C. §§ 2192-2193), this Court found that the statutory scheme was founded upon a reasonable basis. It further observed that, "the soundness or unsoundness of the reasoning is for the determination of Congress," and that:

> In any event, a sweeping requirement of obedience throughout the course of a voyage is certainly not without basis in reason. The strategy of discipline is not simple. The maintenance of authority hinges upon a delicate complex of human factors, and Congress may very sensibly have concluded that a master whose orders are subject to the crew's veto in port cannot enforce them at sea.

Id., at 46. It was, for purposes of deciding *Southern Steamship,* sufficient that the Captain was deprived of his ability to control the operations of the vessel and the actions of the crew.

B. The Facts Of This Case Require Application Of The Holding Of *Southern Steamship.*

Petitioners were employed as seamen, and were in the service of the S/S OCEAN PHOENIX at the time of their strike. Their petition for a writ of certiorari asks whether the Ninth Circuit "misappl[ied] this Court's decision in *Southern Steamship* . . . by failing to distinguish traditional seamen . . . from the factory

workers in this case. . . ." Petition, p. i. Petitioners then attempt to narrowly redefine "seaman" to exclude any person employed aboard a vessel in navigation if they have "no role whatsoever in the propulsion, navigation or handling of the vessel." *Id.* This effort naively ignores that workers on vessels in navigation at sea, who may not have "navigational" duties, nonetheless have responsibility for their own safety, the safety of their fellow crew members, the vessel itself, and the vessel's cargo. It also directly contradicts this Court's recent and definitive test of seaman status in *Chandris v. Latsis,* 515 U.S. 347 (1995).

1. Petitioners Were Seamen Away From Home Port.

As a matter of fact and law, petitioners were seamen. In *Chandris v. Latsis,* 515 U.S. at 368, this Court established a two-pronged test to determine whether an individual is a seaman: (1) "an employee's duties must 'contribute to the function of the vessel *or to the accomplishment of its mission,*'" and (2) "a seaman must have a connection to the vessel in navigation . . . that is substantial in terms of both its duration and its nature." *Id.* at 368 (italics added; citations omitted).

Petitioners primarily processed fish, and processing fish was the primary mission of the vessel. P. App., B-7. There were 220 crew aboard the ship, of

which approximately 120 were classified as processing personnel. Many of the remaining 100 crew were engaged in what petitioners classify as "traditional" roles, but a number of those crewmembers were engaged solely in activities that supported the processors and other crew – preparing meals, cleaning the common areas and staterooms, washing laundry, meeting crew medical needs, and providing management and supervision of the processing operations. These crewmembers, like petitioners, have no role in the "propulsion, navigation or handling of the ship, but they do, like petitioners, contribute to the function of the vessel and accomplishment of its mission.

The crewmembers' connection to the vessel was also substantial in that they lived and worked aboard the ship while it was at sea. *Id.,* at B-7-8. Before joining the crew each processor went through an orientation, during which each was told what he or she could expect aboard the vessel. All crew signed contracts required by federal law, and reported to the vessel with their clothing and other personal possessions prepared to make the ship their home for a period of several months.

Finally, the S/S OCEAN PHOENIX's home port is Seattle, Washington. *See,* www.st.nmfs.noaa.gov/pls/webpls/cgv_pkg.vessel_id_list. When petitioners struck, the vessel was in navigation in the Bering Sea, and was forced into an unscheduled return to the port of Dutch Harbor, Alaska to discharge the striking petitioners. The same basic facts this Court found dispositive in *Southern Steamship* exist in this case and support

the Board's Decision and Order and the Ninth Circuit's denial of the petition for review.

2. Disobedience By Any Seaman To A Captain's Orders At Sea Is Mutiny, Regardless Of The Seaman's Job Title.

This Court, in discussing the applicability of the mutiny statutes, 18 U.S.C. §§ 2192 and 2193, to the actions of the striking workers in *Southern Steamship*, noted that: "Indeed, it is admitted that, had the strike occurred on the high seas, the participants would have been guilty of mutiny." *Southern Steamship*, 316 U.S. at 41. This is because the Captain had indisputably been deprived of his ability to control vessel operations. The total number of crew aboard the S/S CITY OF FORT WORTH does not appear in the record, but the refusal of 13 seamen to return to work was deemed sufficient to deprive the Captain of control of the vessel. Here, 26 crewmembers walked off the job, including the 21 petitioners. When the striking seamen refused to return to work, the Captain of the S/S OCEAN PHOENIX was deprived of his ability to control vessel operations, and was forced to divert immediately to port to maintain ship's order. In *Southern Steamship* this Court did not find it necessary to distinguish the various duties of the striking seamen aboard the S/S CITY OF FORT WORTH; such distinction was irrelevant. Whether it was the ship's cook who refused to prepare a meal, the ship's steward who refused to do laundry, or the deckhand who

refused to cast off a shore line, the dispositive point was that "the flouting of the captain's authority was . . . deliberate and complete," and that the ship was "definitely wrested from the control of its officers." *Southern Steamship,* 316 U.S. at 47. The Court found this to be true even though the striking seamen made no effort to interfere with vessel operations or non-striking crew. It was sufficient that the striking workers "undertook to impose their will upon the captain and officers." *Id.,* at 41.

Moreover, in contrast to *Southern Steamship,* the petitioners in this case struck when the S/S OCEAN PHOENIX was at sea. All parties in the *Southern Steamship* case agreed the striking seamen would have been guilty of mutiny "had the strike occurred on the high seas." *Id.,* at 41. While the Court in *Southern Steamship* declined to excuse the striking crewmembers' disobedience because they were in port, the fact that the insubordination of petitioners here occurred on the high seas makes application of *Southern Steamship's* holding all the more compelling.

Accordingly, both the NLRB and the Ninth Circuit properly applied the holding of *Southern Steamship* to the facts of this case. The Board gave due effect to Congress' statutory prohibitions against a seaman's willful refusal to obey the order of the vessel's Captain when the vessel was in operation at sea. Because the law recognizes only one class of seamen, and Congress provided no exceptions to the seamen's duty of obedience, this argument cannot justify review in this case.

II. Congress Has Demonstrated Its Clear Intent To Require Seamen's Obedience To The Captain's Orders At Sea.

This Court has recognized that seamen owe an unconditional statutory duty of obedience to Captains' orders on a vessel, and that any change to these statutory requirements must come from Congress. *Southern Steamship,* 316 U.S. at 41-43.

A. Congress' Intent As Expressed In 1942.

In enacting the National Labor Relations Act and the criminal statutes proscribing mutiny and incitation to mutiny, Congress created two statutory schemes that conflict in some situations. In *Southern Steamship,* this Court reasoned that these statutory schemes could be reconciled by giving due consideration to the intent of Congress and accommodating the respective interests to be served.

The opinion examined the legislative history of the mutiny statutes, in particular an unsuccessful attempt in 1939 to limit the scope of the mutiny statutes. Finding a clear legislative intent to retain the harsh penalties associated with a seaman's willful disobedience to a Captain's orders, this Court held that compulsory reinstatement of a worker who engaged in conduct proscribed as mutiny or incitation to mutiny – *i.e.,* to deprive the Captain of his authority and command – would violate Congress' intent and purpose in enacting the statutes in the first instance. *Southern Steamship,* 316 U.S. at 43-44.

This same reasoning supports the decisions of the NLRB and the Ninth Circuit Court of Appeals.

In giving effect to both statutory schemes, this Court determined that Congress did not intend to render the statutes proscribing mutiny meaningless by relieving seamen of their duty of obedience to the ship's Captain. Accordingly, in a clear and recognized exception to workers' NLRA right to engage in concerted activities, seamen in the service of a vessel within the admiralty and maritime jurisdiction of the United States may not (individually or as a group) refuse to follow a Captain's order to work when the vessel is away from its home port. In the 56 years since *Southern Steamship* was decided, Congress has accepted this accommodation. "[W]hen the legislative purpose is so plain, we cannot assume to do that which Congress has refused to do." *Id.*, at 44.

B. Subsequent Amendments To The Mutiny Statutes Demonstrate Congress' Intent To Require A Seaman's Duty Of Obedience To Captain's Orders.

Congress has addressed the provisions of the mutiny statutes and the Shipping Code at issue in this case on several occasions since 1942. For example, in 1983, Congress passed Public Law 98-89, § 2(j) which provided that,

> Within 2 years after the date of enactment of this Act [Aug. 26, 1983], the Federal Maritime Commission and the Secretary of

> Transportation each shall submit to Congress a proposed codification of the laws within their respective jurisdictions related to shipping and maritime matters.

Pub.L. 98-89, § 2(j), Aug. 26, 1983, 97 Stat. 599. Thereafter, 46 U.S.C. § 11501 (formerly 46 U.S.C. § 701) was codified in Subtitle II – Part G of the Shipping Code (governing "Merchant Seamen Protection and Relief," hereafter, "MSP&R").

While Congress has amended the penalties for seamen's disobedience to the Captain since *Southern Steamship,* it has never altered the fundamental requirement that seamen comply with the Captain's orders. Indeed, following the Congressional mandate, courts have consistently held that under Section 11501 or its predecessor, a seaman must obey the lawful orders of the master and of his superior officers, and he may (since 1983 amendments) be punished by being confined, and formerly by being clapped in irons, for willfully disobeying those lawful orders. *Hudson Waterways Corp. v. Schneider,* 365 F.2d 1012, 1014 (9th Cir. 1966); *The John & Winthrop,* 182 F. 380, 384-85 (9th Cir. 1910).[1]

Subtitle II of the Shipping Code has been amended by Congress no fewer than nine times since

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[1] "He must obey the lawful orders of the master and of his superior officers, and for willfully disobeying the master's commands he may be punished by being clapped in irons. 46 U.S.C. § 701(4), (5)." *Hudson Waterways,* 365 F.2d at 1014.

1983.[2] As enacted in 1898, the predecessor statute to 46 U.S.C. § 11501 provided that:

> For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience shall cease, and upon arrival in port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

46 U.S.C. § 701 (repealed August 26, 1983; reenacted and recodified as 46 U.S.C. § 11501); *see, N.L.R.B. v. Sea-Land Service, Inc.*, 837 F.2d 1387, 1389-1391 (5th Cir. 1988).

The power of the Master to impose sanctions was not altered by Congress in 1983. The punishment for willful disobedience to a lawful command at sea was changed to confinement until the disobedience ends and the forfeiture of not more than 4 days' pay. 46 U.S.C. § 11501(4). For "continued willful disobedience . . . the seaman . . . may be confined, on water and 1,000 calories, with full rations every 5th day until the disobedience ends," in lieu of bread and water. 46

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[2] 2006 Amendments, Pub.L. 109-304, §§ 15(1)(A)-(C); 2000 Amendments, Pub.L. 106-398, § 1; 1998 Amendments, Pub.L. 105-368, § 402(b); 1996 Amendments, Pub.L. 104-324, Title VI, § 602(b); 1992 Amendments, Pub.L. 102-587, Title V, § 5304; 1988 Amendments, Pub.L. 100-710, Title I, § 101(b), § 102(b), and Pub.L. 100-424, § 6(b); 1986 Amendments, Pub.L. 99-509, § 5101(1); 1985 Amendments, Pub.L. 99-36, § 1(a)(9)(A); and 1984 Amendments, Pub.L. 98-364, Title IV, § 402(7)(A).

U.S.C. § 11501(5). In changing the penalty for breach but not the duty of obedience itself, Congress repeatedly and unequivocally expressed its intention that the power of the ship's Captain was not to be abridged, despite the existence of the NLRA.

Congress has similarly not taken any action to substantively alter the terms of the criminal mutiny statutes. In 1996, for example, Congress amended 18 U.S.C. § 2192 (incitation to mutiny) to fix the maximum penalty that could be imposed under the statute at $1,000. Pub.L. 104-294, Title VI, § 601(a)(8), 110 Stat. 3498 (Oct. 11, 1996). Congress made the same amendment to 18 U.S.C. § 2193 in 1994. Pub.L. 103.322, Title XXXIII, § 330016(1)(I), 108 Stat. 2147 (Sept. 13, 1994). Other than these efforts to update the amount that a seaman could be fined for violation of the statutes, Congress left the statutory scheme fully intact. Congress could have repealed the statutes, but it did not. Congress could have amended the statutes to exempt seamen engaged in strikes or work stoppages from its reach, but it did not. Accordingly, this Court should give deference to the role of Congress in making laws, and deny petitioners' request for review.

C. Congress' Intention To Accommodate Worker Rights To The Need For Discipline At Sea Is Evidenced By The Lack Of Amendments To The NLRA.

Since this Court's holding in *Southern Steamship* in 1942, Congress has amended Section 7 of the National Labor Relations Act only once, in 1947, by adding a provision that employees have the right to refrain from joining in the concerted activities of their fellow employees under the Act. Act June 23, 1947. Congress has amended Section 8 of the Act four times since *Southern Steamship* was decided – 1947, 1951, 1959, and 1974.[3] None of these amendments altered this Court's holding that the rights granted workers by Congress' enactment of the NLRA should be subordinate to a seaman's duty of obedience to the ship's Captain.

It is telling that in 1942 the NLRB was willing to concede that if the strike aboard the S/S CITY OF FORT WORTH had occurred while the vessel was underway the seamen would have been guilty of mutiny. *Southern Steamship,* 316 U.S. at 41. It is even more telling that in 2008 the NLRB remains willing to accede to an accommodation of conflicting statutory provisions that results in a narrow restriction to the rights of workers. Moreover, petitioners have not offered a compelling reason to upset this long-standing accommodation now.

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[3] 1974 Amendments, Pub.L. 93-630, § 1(c), (1)(d); 1959 Amendments, Pub.L. 86-257, §§ 201(e) and 704(a), (c), (e) and (f); later Amendments, Act Oct. 22, 1951 and Act June 23, 1947.

Congress has not substantively changed any of the statutes that were at issue when *Southern Steamship* was decided. In particular, Congress has not sought to change the practical effect of the decision. Given Congress' implicit approval of this Court's accommodation of two apparently conflicting statutory schemes, this Court should reject petitioners' invitation to alter this accommodation now, because doing so would:

> "[I]gnore[ ] the plain Congressional mandate that a rebellion by seamen against their officers on board a vessel anywhere within the admiralty and maritime jurisdiction of the United States is to be punished as mutiny."

Southern Steamship, 316 U.S. at 43.

III. Judicially Altering The Definition Of "Seaman" For Purposes Of The NLRA Would Amount To Legislation In Violation Of The Constitutional Requirement Of Separation Of Powers.

Finally, petitioners ask this Court to accept review to "clarify" that a seaman's statutory duty of obedience to the orders of the ship's Captain does not apply to all seamen. This would require changing important provisions in the present statutory schemes. Because altering the important provisions of a statute is a legislative function, a decision that redefines "employee" and "seaman" for purposes of labor relations

laws would violate the Constitutional requirement of separation of powers. U.S. CONST. art. I.

To achieve the result sought by petitioners, the Court would have to change substantive legislative provisions so that only seamen on board a vessel "involved in propulsion, navigation or handling"[4] of the ship are prohibited from striking in defiance of the Captain's orders. In doing so, it would be necessary to "clarify" that, while the "at-sea factory workers" are exercising their NLRA right to strike, they must nonetheless obey all of the Captain's other orders. This would include orders that would equally pertain to passengers, such as orders limiting access to certain areas of the ship, scheduling meal times, or even to abandon ship. This calls into question, then, whether the contractually-accepted duty of non-traditional seamen to heed a call to stations[5] in an emergency would have to be followed or not.

The Court would also have to "clarify" that the Shipping Code and mutiny statutes do not apply to a seaman who is merely an "at-sea factory worker" so long as his or her "sole duty" is to process fish. The

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[4] As noted earlier, this narrow redefinition of "seaman" proposed by petitioners would also require the Court to revisit the much broader test for seaman status established in 1995 in *Chandris v. Latsis*.

[5] "You will be shown the location of safety and survival equipment and a Station Bill that assigns each employee ***a job*** and place to go in the event of an emergency. . . ." R. App. B-2 (emphasis added).

Court would need to make it clear that any crewmember whose job involves "some" duty beyond that of processing fish would either not be permitted to strike or that they would only be permitted to strike during those hours when they were scheduled to work in the factory.

As can be readily observed, altering any statutory scheme to achieve the result sought by petitioners creates an atmosphere of uncertainty and confusion with respect to the duties of seamen. To be effective, any effort to redefine "seamen" to create categories of "traditional seamen" and "at-sea factory workers" requires legislative action, not a court decision. "It is the Congress, not this Court, that has the capacity to investigate the divergent considerations involved in the management of a complex national labor policy." *Boys Markets, Inc.*, 398 U.S. at 258 (Black, J., dissenting).

In *Southern Steamship*, this Court recognized the need to defer to Congress' intent: "When the legislative purpose is so plain, we cannot assume to do that which Congress has refused to do." *Southern Steamship*, 316 U.S. at 44. Here, the remedy petitioners seek could come only from Congress.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari in this matter should be denied.

Respectfully submitted,

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